**Before the**

**Federal Communications Commission**

**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Connect America Fund | ) | WC Docket No. 10-90 |

# REPLY COMMENTS OF MESCALERO APACHE TELECOM, INC.

## INTRODUCTION

Mescalero Apache Telecom, Inc. (MATI) hereby submits these Reply Comments in regards to the Wireline Competition Bureau's Staff Report on rate-of-return represcription issues.[1]

MATI was formed for the purpose of bringing modern communications services to the people of the Mescalero Apache Reservation. MATI serves the Mescalero Apache Reservation, an area consisting of approximately 720 square miles in south central New Mexico. MATI, as a wholly owned enterprise of the Mescalero Apache Tribe, undertook the risky venture of serving a historically underserved and economically disadvantaged area in order to afford the Mescalero Apache people with access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, and thereby increase the Tribe's access to education, commerce, government, and public services. MATI, by taking the steps it did, also helped bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation. MATI continues its commitment to provide service to the Reservation, which now, as with the rest of the United States, must include investment in broadband capable

[1] Wireline Competition Bureau Staff Report "Prescribing the Authorized Rate of Return: Analysis of Methods for Establishing Just and Reasonable Rates for Local Exchange Carriers", May 16, 2013 (WC Docket No. 10-90) (*Staff Report*)

services. MATI is a rate of return-regulated carrier, and as such is directly impacted by any changes made to the interstate authorized rate of return as a result of this proceeding.

MATI offers these reply comments to further bring focus to issues raised by various parties in the initial round of comments, especially as those issues relate to the substantial disparity between companies used in the *Staff Report* analysis and the small companies to whom the resultant rate of return will be applied.

## REPLY TO COMMENTS

By MATI's count, fourteen parties filed initial comments in response to the Staff Report. Of those fourteen parties, only two - National Association of State Utility Consumer Advocates (NASUCA) and the National Cable & Telecommunications Association (NCTA) - expressed any broad support of the conclusions reached in the *Staff Report*. Other parties, including the National Tribal Telecommunications Association (NTTA) and the National Congress of American Indians (NCAI), opposed the rate of return (RoR) ranges recommended in the Staff Report, especially in regards to Tribally-owned incumbent local exchange carriers (ILECs) such as MATI.

NASUCA claims that the authorized RoR should be at the bottom point of the range presented in the Staff Report - 7.39%.[2] While NASUCA does not provide any empirical evidence in support of its positions, it states "[T]he Commission has not exactly been besieged by carriers' requests to raise the authorized RoR, which implies that most were satisfied with the 11.25% **and have been satisfied for many years**."[3] This false dilemma offered by NASUCA assumes there is only one reason why carriers have not requested the Commission represcribe the 11.25% RoR - that such carriers are "satisfied" with the supposedly "excessive" return. There could be many reasons why this hasn't' occurred in the past 23 years, but perhaps the most important factor is the Commission's rules governing RoR resprescription.[4] Under Part 65, RoR

[2] NASUCA Comments at 2. NASUCA ignores the Staff Report recommendation to increase the lower end of the range due to Time Interest Earned ratio considerations.
[3] *Id*., at 4-5 (emphasis in original)
[4] 47 CFR § 65

represcription proceedings are initiated only under certain circumstances[5], none of which involve individual carriers "requesting" that the RoR be increased. In addition, and assuming individual carriers were allowed to petition or otherwise request a higher RoR, such carriers may choose not to due to the complexity of the subject matter, the costs involved, the time commitment for litigating such a request, and the risk of such a request being denied. Thus, NASUCA's false dilemma should be ignored by the Bureau and Commission.

NCTA likewise requests that the Commission "expeditiously implement the recommendations made by the Wireline Competition Bureau" and "reduce the 11.25 percent rate of return that it adopted 23 years ago."[6] Without presenting any empirical evidence, NCTA simply assumes the RoR adopted over two decades ago is too high, and must be reduced as soon as possible. Indeed, according to NCTA "the Commission has no excuse for continuing to allow this overearning to take place at the expense of consumers."[7] This statement is made, surprisingly, with absolutely no data showing that RoR-regulated ILECs are in general, or that individual ILECs are specifically, overearning. In fact, in order to prove "overearning" in the context presented by NCTA, substantially more facts than the data used to arrive at an authorized RoR would have to be examined - a fact that obviously escapes NCTA.

One problem seems to be common between the *Staff Report* and the comments in support of the *Staff Report*'s conclusions - the lack of a reasonableness test. In summary, a reasonableness test should inform the Commission of whether a proposed course of action - in this case lowering the authorized RoR from 11.25 percent to something less than 8.72 percent - is reasonable considering factors beyond the minutiae of the analysis. In the current case, the test that must be undertaken is to determine whether it is reasonable to reduce the authorized RoR as proposed in light of factors existing in the RoR ILEC industry between 1990 and today. Several parties addressed this issue, but none more comprehensively than the Alexicon comments.[8] Plainly, reducing the RoR, based in large part on an estimate of the return on equity, is not

[5] 47 CFR § 65.101 (a) - "Whenever the Commission determines that the monthly average yields on ten (10) year United States Treasury securities remain, for a consecutive six (6) month period, at least 150 basis points above or below the average of the monthly average yields in effect for the consecutive six (6) month period immediately prior to the effective date of the current prescription, the Commission shall issue a notice inquiring whether a rate of return prescription according to this part should commence."
[6] NCTA Comments at 1-2
[7] *Id*., at 4
[8] See Comments of the Rural Broadband Alliance, Small Company Coalition, and Alexicon Companies (*Alexicon Comments*) at 25-29

reasonable given the risks faced by ILECs in 1990 compared to the risks faced by ILECs in 2013.[9]

As noted by NTTA[10], the Staff Report completely ignores the discussion contained in the *ICC/USF Transformation Order* regarding the RoR to adopt for Tribally-owned carriers.[11] MATI provided comments on this issue previously[12], which were also apparently ignored by the Bureau in the development of the *Staff Report*. In MATI's and NTTA's comments, the Commission was provided with ample evidence in support of a different and higher RoR being applied to Tribally-owned carriers. NTTA recommends a RoR for Tribally-owned carriers of 16.08 percent, based in part on the higher risks faced by such carriers and their investors due to their small size, lack of access to capital markets, lack of the marketability of equity securities, and the nature of the areas served.[13] Much of this boils down to size and, in the case of Tribally-owned carriers, the inherent nature of the service areas to which they are constrained. While all of this, and more, was documented in the *ICC/USF Transformation Order*, and has been verified in comments filed by MATI, NTTA, and others[14], the *Staff Report* casts aside these facts and is therefore not a reasonable basis upon which to base the interstate authorized RoR for Tribally-owned carriers.

As was pointed out by numerous parties[15], the companies included in the *Staff Report* proxy list[16] have little in common with rural ILECs. When compared to MATI, the *Staff Report* proxy group holds no resemblance (2012 data):

[9] *See also* NTTA Comments at 4
[10] *Id*., at 2-4
[11] *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90, et. al., (rel. November 18, 2011) (*ICC/USF Transformation Order*) at 1059
[12] See MATI Comments, WC Docket No. 10-90, et al, (filed January 18, 2012) at 7-10
[13] NTTA Comments at 11
[14] See January 18, 2012 Comments (WC Docket No. 10-90) of Hopi Telecommunications, Inc., and The Gila River Indian Community/Gila River Telecommunications, Inc.; See also July 25, 2013 Comments (WC Docket No. 10-90) of NCAI
[15] Alexicon Comments at 16, NTTA Comments at 6, NECA, NTCA, USTelecom, ERTA, and WTA comments at 20, NCAI Comments at 2
[16] *Staff Report* at 14-25

| Company Group | Access Lines | Total Revenues | Total Plant in Service | Accumulated Depreciation | Net Plant in Service |
|---|---|---|---|---|---|
| MATI | 1,258 | $ 5,421,398 | $ 17,244,188 | $ 10,444,942 | $ 6,799,246 |
| Proxy Company Average | 4,835,380 | $ 17,663,273,312 | $ 34,784,800,871 | $ 19,901,473,431 | $ 14,883,327,439 |
| Magnitude Difference | 3,844 x | 3,258 x | 2,017 x | 1,905 x | 2,189 x |

Any reasonable interpretation of the above data leads to the conclusion that, absent substantial adjustment, a weighted average cost of capital (WACC) based on Staff Report's proxy company list is wholly inadequate, at best, and disastrous at worst.

It is clear from the comparative data presented above that the "average" company in the *Staff Report* proxy list has economies of scale and scope that are several thousands of times of the scales under which small Tribally-owned carriers, such as MATI, operate. For example, consider the mix of wireless segment revenues generated by four of the Staff Report proxy list companies: 52% for AT&T, 62% for ShenTel, 85% for TDS, and 66% for Verizon.[17] By contrast, MATI receives approximately 90% of its regulated annual revenues from its wireline ILEC. Most small companies have very real aspects of risk that are not present (at least not to the same degree) in larger companies. Smaller firms such as MATI have greater risks due to greater reliance on key persons, reduced market reach, customer and supplier concentrations, fewer financial resources, non-diversified product/service offerings, differences in regulation, limited information systems, limited commercial customers, and a host of other issues. In addition, Tribally-owned carriers face additional difficulties related to the areas they serve, such as those noted in the *ICC/USF Transformation Order*:

- Tribally-owned carriers play a vital role in serving…often…remote, low income and underserved regions of the country
- Tribally-owned carriers serve cyclically impoverished communities with a historical lack of critical infrastructure
- Reservation-based communities lack fundamental similarities to non-reservation economies and are among the most impoverished economies in the country

[17] All amounts obtained from 2012 SEC Form 10-K

- Tribal Nations cannot collateralize trust land assets, and as a result, have more limited abilities to access credit and capital[18]

Each of these factors increase the risk to investors as compared to companies with several thousand times the operating revenues, and in diversified industries, that MATI has.

## **CONCLUSION**

MATI requests the Commission fully recognize the increased risks faced by its investors, as well as the investors in other similarly-situated Tribally-owned carriers when adopting a new interstate authorized rate of return. The evidence shows that small company equity shares require a higher return before rational people or entities will invest due to the increased risk. Serving Tribal areas only exacerbates this situation, which the Commission itself recognized in the *ICC/USF Transformation Order*. MATI asks the Commission consider these facts, which were ignored in the Staff Report, and adopt a rate of return such as that advocated by NTTA and in the Alexicon Comments.

Respectfully Submitted,

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Mescalero Apache Telecom, Inc.

August 26, 2013

[18] *ICC/USF Transformation Order* at 1059